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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A. INC.,
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE CLEAN AIR ACT PRECLUDES EPA FROM ADOPTING A PLANTWIDE "SOURCE" DEFINITION	4
A. The Section 111(a)(3) Definition of "Stationary Source" Does Not Apply to Part D of the Clean Air Act	4
B. Even if It Did Apply to Part D, the Section 111(a)(3) "Source" Definition Does Not Preclude EPA from Adopting a Plantwide Interpretation of that Term for Purposes of Part D	7
C. The Plantwide Definition of "Source" Is Not Prohibited by Section 173	8
D. The Legislative History Does Not Preclude EPA from Adopting a Plantwide Definition of "Source"	9
II. EPA'S CONSIDERATION OF THE ISSUES RAISED BY THE PLANTWIDE "SOURCE" DEFINITION WAS ADEQUATE	11
III. THE STATE *AMICUS* BRIEF PROVIDES NO BASIS FOR INVALIDATING THE PLANTWIDE "SOURCE" DEFINITION	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979)	2, 8
ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978)	8
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932)	5
Bunker Hill Co. v. EPA, 658 F.2d 1280 (9th Cir. 1981)	10
Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980)	5, 6
Train v. Natural Resources Defense Council, 421 U.S. 60 (1975)	10, 12
Union Electric Co. v. EPA, 427 U.S. 246 (1976)	10
STATUTES:	
Clean Air Act, as amended by 1977 Amendments, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. §§ 7401 *et seq.* (Supp. V)	
Part A, 42 U.S.C. §§ 7401-7428	11
Section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D)	6
Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I)	6
Section 110(a)(4), 42 U.S.C. § 7410(a)(4)	6
Section 111, 42 U.S.C. § 7411	3, 4, 5, 6, 7
Section 111(a), 42 U.S.C. § 7411(a)	4, 5, 6
Section 111(a)(3), 42 U.S.C. § 7411(a)(3)	4, 7, 8
Section 111(a)(4), 42 U.S.C. § 7411(a)(4)	6
Section 113, 42 U.S.C. § 7413	10, 11
Part C, 42 U.S.C. §§ 7470-7479A	5, 13
Section 169(2)(C), 42 U.S.C. § 7479(2)(C)	5
Part D, 42 U.S.C. §§ 7501-7508	*passim*
Section 171, 42 U.S.C. § 7501	5, 6, 10
Section 171(4), 42 U.S.C. § 7501(4)	5, 6
Section 173, 42 U.S.C. § 7503	8, 9
Section 302, 42 U.S.C. § 7602	5, 6, 10
Section 302(j), 42 U.S.C. § 7602(j)	9

TABLE OF AUTHORITIES—Continued

Page

Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 139 (1981), codified as amendments to Section 113 of the Clean Air Act, 42 U.S.C. § 7413 10

REGULATIONS:

40 C.F.R. § 51.18(j)(1)(i)-(iii) (1981) 8
40 C.F.R. Part 60 (1983) 3

LEGISLATIVE MATERIALS:

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977).. 13
S. Rep. No. 666, 97th Cong., 2d Sess. (1982) 10

FEDERAL REGISTER:

46 Fed. Reg. 50766 (October 14, 1981) 11

MISCELLANEOUS:

Rhinelander, *The Bubble Policy and the Clean Air Act*, 13 Envtl. L. Rep. 10406 (1983) 2, 12

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Petitioners, American Iron and Steel Institute, *et al.*, American Petroleum Institute, *et al.*, Chemical Manufacturers Association, General Motors Corporation and the Rubber Manufacturers Association, file this brief in reply to the briefs of respondents Natural Resources Defense Council, *et al.*, ("NRDC") and *amici curiae* United Steelworkers of America and Commonwealth of Pennsylvania, *et al.* Respondents repeatedly attempt to portray the plantwide "source" definition as a threat to attainment of national ambient air quality standards (NAAQS) in nonattainment areas. Such is not the case. In fact, as one commentator has noted, "[t]he bubble is *most needed* in nonattainment areas" in order "to stimulate growth compatible with the Clean Air Act." [1]

Before we address respondents' and *amici*'s concerns in detail, several points should be emphasized. First, use of the plantwide "bubble" *by definition* means that in *no* event can total emissions from a plant increase above *de minimis* levels, and in most instances overall emissions will *decrease* significantly.[2] *"De minimis"* emissions are emissions which are so trivial as to make regulation thereof "pointless expenditures of effort." *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979). As the court there stated, "The ability . . . to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design." *Id.* To the

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[1] Rhinelander, *The Bubble Policy and the Clean Air Act*, 13 Envtl. L. Rep. 10406, 10414 (1983) (hereafter cited as Rhinelander) (emphasis added).

[2] *See, e.g.*, Chevron Br. at 17-19. NRDC repeatedly asserts that existing sources can avoid new source review with "partial" offsets. NRDC's own statistics (NRDC Br. at 5 n.13), however, prove that "partial" offset situations almost never occur. Of the 604 modifications undertaken between 1976 and 1980 by major stationary sources located within nonattainment areas, 590 achieved greater-than-even offsets. That is to say, 97+% of all major plant modifications during that period in fact resulted in emission *decreases*.

extent that NRDC is really attacking EPA's "*de minimis*" emission levels, its challenge is both untimely and unsupportable.

Second, any state which elects to implement a plantwide "source" definition must still demonstrate to the satisfaction of EPA that its Part D State Implementation Plan (SIP), including such definition, will be sufficient to enable the state to make reasonable further progress toward attainment and to achieve attainment as expeditiously as practicable. These requirements apply *regardless* of the "source" definition implemented by the state. Indeed, as noted by EPA (EPA Br. at 3, 39), eighteen of the thirty-one states which had adopted the plantwide "source" definition before it was vacated by the court below successfully demonstrated that the plantwide definition is consistent with these air quality goals.

Third, new production units or pieces of equipment added to an existing plant already are subject to extensive state and federal review and technological control. State operating permits are required in virtually all instances, and many pieces of equipment, particularly larger units such as boilers, furnaces, etc., also must meet federal new source performance standards (Section 111, 42 U.S.C. § 7411; *see* 40 C.F.R. Part 60 (1983)). The implication that large, heavy emitting units will go unreviewed (NRDC Br. at 2) is without basis in fact.[3] A state which elects to impose even more stringent technological controls on new units at existing plants is also completely free to do so. *See, e.g.*, Comments of Ohio EPA, J.A. 138.

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[3] NRDC suggests (NRDC Br. at i, 2) that the plantwide definition allows the construction of "boilers and blast furnaces" within existing plants as if to suggest these kinds of major projects are routinely escaping new source review. To the contrary, projects of this magnitude involve emissions much higher than the 25 to 100 ton per year significance levels complained of by respondents and, in most cases, cannot be netted out of the new source review process.

I. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE CLEAN AIR ACT PRECLUDES EPA FROM ADOPTING A PLANTWIDE "SOURCE" DEFINITION

NRDC's arguments against the plantwide "source" definition depart radically from the conclusions of the court below. The *sole* basis cited by the court for its decision was the so-called "bright line" test, which the court held precluded it from exercising its own judgment in construing the Act. NRDC's brief never even mentions this rationale. Rather, NRDC relies entirely on arguments that the language and legislative history of the Act preclude use of a plantwide "source" definition—arguments which the court below explicitly rejected.

NRDC's statutory language arguments (NRDC Br. at 26-32) can be reduced to two contentions:

1. The Clean Air Act *does* specify a definition of "stationary source" applicable to Part D and that definition can be found in Section 111, 42 U.S.C. § 7411 (the provision requiring that technology-based performance standards be applied to new sources regardless of location); and
2. The four constituent terms ("building, structure, facility, or installation") of the Section 111 "source" definition *require* EPA to impose either a unit-specific or a "dual" definition of "source."

Both assertions are incorrect. The Act does not specify a definition of "source" applicable to Part D. In any event, the Section 111 "source" definition, even if it were found to be relevant for purposes of Part D, does not preclude EPA from adopting, and allowing the states to adopt, a plantwide "source" definition for nonattainment areas.

A. The Section 111(a)(3) Definition of "Stationary Source" Does Not Apply to Part D of the Clean Air Act

Section 111(a), as amended, defines seven terms which are to be used explicitly "[f]or purposes of [that] sec-

tion." As a group, these terms establish the jurisdictional scope of the Section 111 new source performance standard program. Two of these terms, "stationary source" and "new source," delineate those entities for which EPA may promulgate standards of performance and to which such standards may be applied.

Despite the Section 111(a) language limiting these definitions to Section 111, NRDC attempts to engraft them to the rest of the Act, including Part D. NRDC first argues that there is a "presumption" that "a word has the same meaning when used throughout a single statute." NRDC Br. at 28. Such a presumption, however, is "not rigid" and "readily yields," where, as here, it is clearly rebutted by the explicit language and structure of the Clean Air Act. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

Definitions applicable to the entire Clean Air Act are contained in Section 302, 42 U.S.C. § 7602, of that Act. Definitions applicable only to Part D are set forth in or incorporated by Section 171, 42 U.S.C. § 7501. Neither Section 302 nor Section 171 contains a definition of "stationary source." In the 1977 Amendments to the Act establishing Part D, when Congress intended to apply a Section 111 definition to other parts of the Act, it did so explicitly. *See, e.g.*, Section 171(4), 42 U.S.C. § 7501(4), incorporating the Section 111 definition of "modification" for purposes of Part D, and Section 169(2)(C), 42 U.S.C. § 7479(2)(C), utilizing the same definition for purposes of Part C. That the Section 111 definition of "stationary source" was not similarly incorporated strongly indicates Congress's intent not to apply that definition to Part D.

In *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), a case which presented virtually the identical statutory construction issue raised here by NRDC, the petitioner argued that the definition of a term

in Title I of the Employee Retirement Income Security Act should be applied to that term as used in Title IV of that Act. This Court declined to apply the Title I definition to Title IV because the applicability of the Title I definitions was limited, as here, by the introductory phrase "for purposes of this title." 446 U.S. at 370.[4] This Court further observed that the limited applicability of the Title I definition was "reinforced by the fact that Title I definitions are occasionally expressly incorporated by reference in Title IV" and that this "specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force . . ." *Id.* at 370 n.14.

NRDC also argues that because Sections 110(a)(2)(D) and (a)(4), 42 U.S.C. §§ 7410(a)(2)(D) and (a)(4), refer to "locational review" of new sources subject to Section 111 standards of performance, the Section 111(a) definition "has applied to new source review in areas with unhealthy air since 1970." NRDC Br. at 30. NRDC misreads these provisions. "Locational review" is simply a component of the Section 111 review process and must be undertaken regardless of whether a new source is to be constructed in an attainment or nonattainment area.[5]

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[4] NRDC would have this Court ignore the Section 111(a) prefatory language "[f]or purposes of this section" because it does not read "for purposes of this section *only*." NRDC Br. at 30 n.57. Such a construction would (a) deprive the Section 111 phrase of its purpose of delineating the proper scope of the Section 111 definitions, and (b) undercut the effect of similar phrases in the Act. *See, e.g.*, the general definition provision, Section 302 ("When used in this Act—") and the Part D definition provision, Section 171 ("For the purpose of this part and section 110(a)(2)(I)—"). Use of the word "only" as suggested by NRDC would hinder Congress's ability selectively to incorporate Section 111 terms elsewhere in the Act, *e.g.*, precluding Section 171(4)'s incorporation of the Section 111(a)(4) definition of "modification."

[5] Section 110(a)(2)(D) provides for state "review (prior to construction or modification) of the location of new sources to which a standard of performance will apply." Section 110(a)(4) provides:

Thus, contrary to NRDC's assertions, "locational review" under Section 111 is not a basis for asserting that the Section 111 definition of "source" applies to anything other than Section 111.

B. Even if It Did Apply to Part D, the Section 111(a)(3) "Source" Definition Does Not Preclude EPA from Adopting a Plantwide Interpretation of that Term for Purposes of Part D

Even if the Section 111(a)(3) definition of "source" did apply for purposes of Part D of the Act, the result sought by NRDC still would not follow. NRDC focuses on the four statutory terms used to define "source"—"building," "structure," "facility," and "installation." NRDC Br. at 27-30. As is readily apparent from common usage of each of these terms, they all can encompass an industrial plant. For example, in common parlance a military "installation" includes all of the component parts of a naval base, not isolated units. Similarly, Webster's Dictionary defines a "facility" as "something (as a hospital) that is built, installed or established to serve a particular purpose." Surely a hospital includes all of its component parts, including separate wings, buildings, equipment, etc.[6]

"The procedure referred to in paragraph (2)(D) for [state] review, prior to construction or modification, of the location of new sources shall . . . provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the *attainment or maintenance* within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard . . ." (emphasis added).

[6] NRDC also concedes that the terms "facility" and "installation" can be construed to refer to entire plants without doing violence to their common sense meaning (NRDC Br. at 29 n.56) but argues that the terms "building" and "structure" cannot reasonably be read to refer to anything other than industrial units of production or operation. NRDC Br. at 27, 30. This argument is inconsistent with NRDC's position that the "dual" definition is valid

The most critical part of the Section 111(a)(3) definition, which NRDC ignores, is the conjunction "or." While the statutory "source" definition is concededly broad, Congress prohibited defining a "source" as a combination of other "sources." Both the *Alabama Power*[7] and *ASARCO*[8] decisions are completely in accord on this point. Yet this is precisely the result that NRDC argues is compelled by Section 111(a)(3)—a "dual" "source" definition that would define a "source" in terms of both the overall plant *and* its component parts. Congress, by using the conjunction "or," rather than the conjunction "and," made clear that no such result was intended or authorized.

C. The Plantwide Definition of "Source" Is Not Prohibited by Section 173

NRDC also argues that a plantwide definition of "source" is prohibited by Section 173 of the Act, 42 U.S.C. § 7503, since under that definition the requirements of Section 173 will not apply to new emission units at an existing plant if there is no increase in plantwide emissions. NRDC Br. at 32. This argument is circular and sheds no light on the question before this Court. Section 173 imposes requirements only on new

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and proper. Under that definition "building" and "structure"—the two terms that NRDC now contends can apply only to individual production units—in fact referred to entire plants. *See* 40 C.F.R. § 51.18(j)(1)(i)-(iii) (1981). Indeed, of the four terms in question, "building" and "structure" are the only two that have *never* been used to refer to anything other than an entire plant. Beyond that, however, NRDC overreaches in asserting that "building" and "structure" cannot be defined as an entire plant. While there are many situations where "plants" are housed within a single "building" or "structure," it is a rare plant in which each of the "industrial units which make up a plant" is segregated into a separate building or structure.

[7] 636 F.2d at 395-96, 402.

[8] ASARCO, Inc. v. EPA, 578 F.2d 319, 323 n.9, 324 and n.17, 326-27 (D.C. Cir. 1978).

sources or modifications to existing *sources*. If an entire plant may be treated as a single source, then Section 173 does not apply to any change within that plant that does not significantly increase plantwide emissions.

The nub of NRDC's argument, however, appears to lie in NRDC's perception that it is unfair or contrary to Congress's intent to treat a given emission unit as a modification when constructed at an existing plant but as a new source if constructed at a new site. NRDC Br. at 2, 4, 32.[9] There is a clear distinction between emission units built at existing plants and those at new sites. An emission unit at a new site invariably results in an increase in emissions. That is often not the case with emission units at existing sites; and if it should be the case, review will be required under the present regulations.

D. The Legislative History Does Not Preclude EPA from Adopting a Plantwide Definition of "Source"

Industry Petitioners will not attempt here to improve upon EPA's analysis of the relevant legislative history.[10] We agree with EPA that the legislative history does not preclude EPA from adopting, or allowing the states to adopt, a plantwide definition of "source" for nonattainment program purposes. We do note that the court be-

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[9] NRDC makes much of this supposed distinction between the construction of a new source at a virgin site versus the construction of that same source within an existing plant. In fact, existing source modifications are regulated more strictly than are completely new sources. No matter whether a plantwide or a "dual" definition of "source" applies, construction at a new site of a new facility emitting up to 99 tons of any air pollutant is not subject to new source review because it is not a "major" source. *See* the Section 302(j), 42 U.S.C. § 7602(j), definition of "major stationary source." Much smaller projects built within existing plants, however, are subject to new source review as "modifications" if the net emission increase exceeds one or more of the significance levels (*e.g.*, 25 tons or more per year for particulate matter).

[10] *See* EPA Br. at 42-48 and EPA's Reply to NRDC's Opp. at 4-7.

low considered NRDC's legislative history arguments,[11] conducted its own survey of that history, and ultimately concluded that the legislative history of the 1977 Amendments to the Act affords no clear resolution of the "source" issue. 685 F.2d at 723, Chev. Pet. App. at A-8. Having so concluded, the court below should have deferred to EPA's reasonable interpretation of that term for purposes of Part D. *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *Train v. NRDC*, 421 U.S. 60, 87 (1975).

The *post hoc* legislative history cited by Respondent NRDC (NRDC Br. at 38) and *amicus* United Steelworkers of America relating to the Steel Industry Compliance Extension Act of 1981 [12] does not shed any light upon Congress's intent in 1977 with regard to the scope of "source" for purposes of Part D.[13] It is well settled that *post hoc* legislative statements and determinations are not a reliable indicator of the collective intent of a prior Congress. *Bunker Hill Co. v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981). Moreover, Congressional state-

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[11] Restated by NRDC in its Brief at 33-38 and its Opp. at 10-21.

[12] Pub. L. No. 97-23, 95 Stat. 139 (1981), codified as amendments to Section 113 of the Clean Air Act, 42 U.S.C. § 7413.

[13] The Extension Act was passed by Congress in July, 1981, four months after EPA's March, 1981 *Federal Register* proposal to adopt a plantwide definition of "source." If Congress wanted to settle this point in the 1981 Act, it could have done so easily and directly by insertion of a definition of "source" in Part D or Section 302. In fact, as NRDC points out (Opp. at 24 n.50), in May, 1982 the Senate Committee on Environment and Public Works, in S. 3041, adopted an amendment to Section 171 adding a definition of "major stationary source" as "each discrete operation, unit, or other activity which produces or may produce emissions of one hundred tons or more per year" of a pollutant for which the area does not meet ambient air quality standards. S. 3041, § 114 (adding Section 171(5)), reprinted in S. Rep. No. 666, 97th Cong., 2d Sess. 157 (1982). That S. 3041, although not enacted, included such a definition underscores Petitioners' point that Part D in its present form does not specify a definition for "source."

ments narrowly focusing upon amendments to Section 113 (relating to enforcement), 42 U.S.C. § 7413, of Part A of the Clean Air Act for the purpose of granting relief to the economically beleaguered steel industry cannot be applied meaningfully to interpret terms of the Part D programs with their far broader purposes of accommodating growth and air quality improvement in nonattainment areas.

II. EPA'S CONSIDERATION OF THE ISSUES RAISED BY THE PLANTWIDE "SOURCE" DEFINITION WAS ADEQUATE

Contrary to NRDC's assertions at 25-26 of its brief, EPA did *not* fail to consider an important aspect of the problem, *i.e.* whether the plantwide definition of "source" promotes pollution-reducing modernizations or, more accurately, whether the "dual" definition discourages such modernizations. EPA raised this issue and weighed comments on it. *See* 46 *Fed. Reg.* 50767-68 (Oct. 14, 1981), J.A. 104-06. Pertinent responsive comments cited actual situations of the modernization-inhibiting effects of the "dual" definition. No other comments provided evidence to the contrary. In the end, however, EPA based its adoption of the plantwide definition upon two important policy considerations (administrative simplicity and state flexibility) and explicitly disclaimed any reliance on the impact upon modernization of either definition. *Id.*[14]

[14] The court below criticized EPA's failure to produce any "studies" or "surveys" establishing that the "dual" definition would retard air quality improvement in the aggregate. 685 F.2d at 727 n.41, Chev. Pet. App. at A-18 n.41. At no prior time, however, during the August 1980 promulgation of the "dual" definition or otherwise, did EPA cite any such study or survey establishing that the "dual" definition would *aid* air quality in aggregate. Neither the 1980 "dual" definition rulemaking record nor the 1981 plantwide definition rulemaking record contains any studies or surveys on the modernization impact of either definition nor did EPA claim that studies or surveys existed to support either definition. Absent such studies or surveys, EPA properly based its 1981 determination upon

EPA's choice has a rational basis, and, under settled principles, that choice must be upheld whether or not NRDC or the court below agrees that it is the best choice.[15] *Train v. NRDC*, 421 U.S. at 87.

III. THE STATE *AMICUS* BRIEF PROVIDES NO BASIS FOR INVALIDATING THE PLANTWIDE "SOURCE" DEFINITION

The states joining the Pennsylvania *amicus* brief do not, and in the face of clear record evidence to the contrary[16] cannot, contend that a "dual" definition of "source" is essential to enable all states to reach attainment of ambient air quality standards as expeditiously as practicable. Indeed, they do not even contend that that is the case in their *own* states. Rather, they argue that (1) unless all states are forced to adopt a "dual" definition, regardless of whether that definition will benefit air quality, other states such as themselves will be at a "competitive disadvantage" (State Br. at 8), and (2) a man-

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reasonable policy considerations of administrative simplicity and maximum state flexibility. *See* Rhinelander at 10416.

[15] As more fully set forth in the initial briefs (Industry Br. at 23-31, EPA Br. at 23-41), reducing emissions was not the only purpose which underlay Congress's enactment of Part D of the Act. Had it been, Congress simply could have prohibited the operation of any source in any area where national ambient air quality standards are exceeded. Instead, however, Congress carefully crafted a balance between economic vitality and the need to reduce emissions. Even if "studies" or "surveys" were available (*see* n.14 above), therefore, demonstrating that the "dual" definition was superior to the plantwide definition in terms of reducing emissions, that alone would not invalidate EPA's choice of the plantwide definition. The only inflexible command of the Act is that the ambient standards be attained by a given date. It is neither unlawful nor arbitrary for EPA to permit states to use a plantwide definition when and if they can demonstrate that that mandate will be achieved with that definition.

[16] *See* Comments of the Arizona Department of Health Services, J.A. 136-37.

datory "dual" definition gives the states a powerful club for forcing existing plant owners seeking to grow or modernize "voluntarily" to settle with a state, rather than litigate, *other*, unrelated air issues in controversy with that state (State Br. at 10).

We submit that to require a nationwide "dual" definition of "source" on the basis of such considerations would fly in the face of the expressed intent of Congress in enacting Part D—namely to give *all* states "greater flexibility [in allowing reasonable economic growth in nonattainment areas while assuring attainment of ambient air standards] than EPA's [then] present interpretative regulations afford." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 211 (1977).

There is no basis in the Act for penalizing the thirty-one states or jurisdictions that have to date elected to implement a plantwide "source" definition (*see* EPA Br. at 3, 39)—and of which eighteen have already demonstrated to EPA that such implementation is consistent with achievement of the air quality goals of the Act—because a handful of other states elect not to do so. States always have the option of adopting requirements more stringent than the Act requires, but if they elect to do so, they must also accept the consequences—that industry may choose to relocate in areas which permit reasonable growth and modernization consistent with attainment and maintenance of national standards. Indeed, the relocation of industry to areas where there is more opportunity and room for growth and modernization is basically consistent with the goals of both Parts C and D of the Act.

CONCLUSION

For the foregoing reasons, in addition to those stated in our initial brief, the decision below should be reversed.

Respectfully submitted,

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